IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-156

SEP 28 1971
E. ROBERT SEAVER, CLERK

UNITED STATES *ex rel.* OTIS CHESTNUT, MICHAEL BROWN, STEPHEN MARTINOT, ELLEN SHALLIT and LEVI LAUB,

Petitioners,

—v.—

CRIMINAL COURT OF THE CITY OF NEW YORK, GEORGE F. McGRATH, Commissioner of Corrections of the City of New York and FRANK S. HOGAN, District Attorney of New York County,

Respondents.

PETITIONERS' REPLY BRIEF

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—v.—

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PETITIONERS' REPLY BRIEF

The Property Qualification; Discrimination Against the Poor

1. In our petition we have taken the basic position that the *de minimis* concept cannot constitutionally be applied to the deliberate admitted exclusion (by the property qualification) of the very poor from jury service, petit and grand—particularly since the allegation of petitioners' poverty in the petition is not denied. Further consideration leads us to conclusion that the *de minimis* concept is not applicable factually here at all. What respondents and the courts below are expressing is simply the all too familiar phenomenon that the poor, however numerous, are invisible non-persons to their more affluent neighbors.

Every relevant statistical indicator we have consulted shows that the New York property qualification operated to exclude a large number of persons from jury service. For example, the 1970 *Statistical Abstract of the United States,* Table No. 485, page 321, shows the following nationwide figures:

Year	*Percentage of Family Units With No Liquid Assets*	*Percentage of Family Units With Liquid Assets Under $200*
1963	20	15
1965	20	17
1968	19	15
1969	19	14

The 1960 Census, Vol. 34, table 86, page 383 gives the following income figures for New York County family units:

Total family units	414,911
Family units with incomes under $1,000	20,796
Family units with incomes of $1,000-$1,999	28,962
Family units with incomes of $2,000-$2,999	41,968

Projector: *Survey of Changes in Family Finances* (Federal Reserve System, 1968) Table 1, page 6, shows that 24% of all family units with annual incomes under $3,000 spend more than they earn. Another study, Projector and Weiss: *Survey of Financial Characteristics of Consumers* (Federal Reserve System, 1966), Table A-1, page 96, shows that 30% of all persons with income under $3,000 have a zero or negative net worth.

What these statistics mean for this case is that in New York County there is a large group of persons who eke out their living from day to day. This large group literally has no assets; it was excluded from service on the 1964 Grand Jury, although it was eligible in every other respect.*

Thus, this case presents squarely a situation where a large class of eligible citizens, the very poor, have been deliberately and intentionally excluded from grand jury service by the property qualification. It is not denied that some of petitioners are in that class and it is conceded by the court below that the exclusion is unconstitutional (. . . "no sufficient justification . . . is apparent . . .," Petition, p. 14a). Plainly, therefore, as the argument of our petition shows, the ruling below is at war with the decisions of this Court.

2. Underlying the basic error below was the erroneous assumption that the respondents need not show factually a valid defense for New York County's departure from the general requirement that no constitutionally eligible group be excluded from grand jury service. But it is always the obligation of a party asserting an exception to the general rule to show the validity of that exception. Where a denial

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* The property qualification for petit jurors was assertedly abandoned in 1960; the 1964 grand jury list was chosen late in 1963. Two terms of petit jury service were required of grand jurors and the shortest time this could have been accomplished was three years. Thus, even if all the new grand jurors on the 1964 list has commenced petit jury service in 1960 and served again in 1962 (both highly unlikely events), 91% of the grand jury list were chosen for jury service when the property qualification was operative. In actuality, probably one tenth of the 1964 replacements for the grand jury list were selected for jury service without reference to the property qualification.

of basic right is involved that rule of common sense becomes a constitutional rule (Petition, p. 18).

3. Respondents have been unable to formulate a "Question Presented" where the answer on the record does not condemn New York County's selection system as unconstitutional. To use respondents' formulation, the 1964 grand jury was, in truth, empanelled with "purposeful and intentional exclusion" of elements of the community "entitled to representation." The poor and young adults were intentionally excluded by respondents' own admission. Respondents do not contend, for instance, that there was not a very substantial number of adults under 35 who had served two terms as petit juror. (This could occur as early as a man's twenty-fourth birthday.) Yet even this large group, all of whom overcame the asserted rationale for the exclusion of younger adults, were deliberately and intentionally excluded from grand jury service.

Likewise, there is no question that there was a large group of welfare clients available for jury service. (Indeed, they constituted one large group of the poor with time available to whom the meagre stipend would have been welcome.) As respondents point out (page 26) over 10% of the welfare group were clearly available for jury service. Certainly, an equally large or larger number were additionally available. A man or woman may be disabled from steady employment and yet be able and eager to attend grand jury sessions; a welfare mother whose teen age children are in school is as available for jury service as a middle class mother similarly situated. And the Criminal Courts Building of New York County (where the grand juries sit) is within strolling distance of a poverty stricken area of New York County with a large welfare population.

Finally, of course, respondent concedes that over 90% of the 1964 grand jury list was selected under the property qualification, yet another deliberate and intentional exclusion of an eligible class.

We are not merely scoring a debating point when we argue from respondents' "Question Presented." Rather, we use this argument to highlight the basic constitutional weakness of respondents' case. The simple fact is that the elitist premises underlying New York County's selection system led it inevitably into unconstitutional exclusions. We submit that no matter how the question presented be formulated, the answer must remain the same. New York County's system is unconstitutional.

Respectfully submitted,

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